Supreme Court U. S.
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In The
Supreme Court Of The United States

APRIL TERM, 1977

NO. 77-23 .

LONNIE McLUCAS

Petitioner

v.

STATE OF CONNECTICUT

Respondent

RESPONDENT'S BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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STATEMENT OF THE ISSUES

1. a) Whether the trial court acted properly in denying the Petitioner's Motion to Suppress the statements he made to New Haven Police on June 11, 1969?

1. b) Whether the trial court's determination that the Petitioner's statement was admissible was reached after sufficient consideration of the possibility of "official misconduct" leading to the Petitioner's arrest in Salt Lake City?

2. Whether there is authority in the courts of the State of Connecticut for authorizing immunity to defense witnesses and whether the absence of such authority does not deprive a defendant of due process of law?

3. Whether the trial court erred in holding that Petitioner lacked standing to challenge the use of evidence seized at Warren Kimbro's apartment?

STATEMENT OF THE CASE

The Petitioner was charged in an Information dated May 27, 1969, with one count of conspiracy to commit kidnapping, one count of conspiracy to commit murder and one count of binding with intent to commit a crime, all of which arose out of the death of one Alex Rackley. The conspiracy to murder Rackley was alleged to have developed during the period of May 18th through the 21st, 1969 and was alleged to have included various members and affiliates of the Black Panther party in New Haven, Connecticut, including Warren Kimbro, George Edwards, Ericka Huggins, Loretta Luckes, Maude Francis, Jeanne Wilson, Rose Marie Smith, Margaret Hudgins, George Sams, Roy B. Hithe, Frances Carter and Landon Williams. (Information; R. pp.3,4)

After a trial to the jury of McLucas alone, the Petitioner was found guilty on the Second Count only - ie, of conspiracy to commit murder. (Judgment; R. pp.54,55). Various other members of the conspiracy pleaded guilty to the charges against them and testified for the State against this Petitioner. Most notable was the testimony of Warren Kimbro, who pleaded guilty to Second degree murder, and George Sams, who also pleaded to a second degree murder charge. Others who pleaded guilty subsequent to this Petitioner's trial (and did not testify on behalf of the State) were Roy Hithe (conspiracy to commit murder); Landon Williams (conspiracy to commit murder); and Loretta Luckes (conspiracy to commit kidnapping).

In a subsequent trial, all charges against National Black Panther Party chairman Bobby Seale and Ericka Huggins were dismissed after lengthy proceedings ended in a hung jury. Seale had been charged with giving the order to have Alex Rackley killed since Rackley was suspected of having been a police undercover informant in the arrest of the so-called "Panther-21" in New York City.

During the trial, the Petitioner, McLucas, described his participation in the alleged conspiracy and admitted to having fired a .45 cal. bullet into the body of Alex Rackley in a swamp in Middlefield, Conn. His defense for these actions was predicated on the basis of an overwhelming fear of, and coercion from one George Sams, whom the Petitioner sought to portray as a madman.

The State contended basically that Alex Rackley was tortured and killed because he was suspected of being a police informer and that orders had come "from National" to eliminate the informant as a policy determination of this quasi-political organization and that all of the local members of the Black Panther party, including Mr. McLucas, had participated in the conspiracy to kill Alex Rackley because of their identification with the goals of that organization, not because of the pressure of one man - George Sams.

The conspiracy to murder Alex Rackley, and the Petitioner's participation therein, is probably best described by

the testimony of Warren Kimbro, who had earlier pleaded guilty to Second degree murder for his participation in the offense. Kimbro testified, in part, as follows:

Kimbro in May of 1969 thought that he was a member of the Black Panther Party but some time during the second week in May two representatives of the National headquarters of the party - ie, Landon Williams and George Sams - came to New Haven and told the local chapter they were not Panthers. (Tr.p.509). Ericka Huggins confirmed that Williams and Sams were from National headquarters in Oakland, California. (Tr.p.510). These two told the local Panthers that they were here to straighten out the chapters on the East Coast. (Tr.p.510). Lonnie McLucas was present during these conversations with the representatives from "National". (Tr.p.513). Williams and Sams left New Haven and went to New York but returned on Saturday night, bringing with them, among others, one Alex Rackley. (Tr.p.514).

Alex Rackley slept at Warren Kimbro's apartment, which also served as Black Panther Party headquarters in New Haven on that Saturday night. When he awoke, Alex was told by Ericka Huggins that he couldn't sleep around the office. Ericka Huggins told George Sams that Rackley had been disrespectful to her and Sams said that Rackley had to be disciplined for this disrespect. Kimbro and Sams then commenced to "discipline" Rackley by beating him with a stick and then fists. (Tr.p.516). After this "discipline" George Sams told Rackley

that he was an informer and they were going to question him about this fact. (Tr.p.516). When Rackley was then questioned, those present were the Petitioner, George Edwards, Kimbro, George Sams and, occasionally, Ericka Huggins. (Tr.p.517).

During the questioning, George Sams handed Rackley an old Panther newspaper and told him to read the ten point program, which he did. (Tr.pp.517,518). Then Sams said "You know more information" so another "discipline" was ordered for him. The "discipline" consisted of Rackley's being punched by those present, including the Petitioner, Lonnie McLucas, Kimbro, Edwards and George Sams. (Tr.p.518).

Following this disciplinary action, Sams ordered that Rackley be tied to a chair. While Warren Kimbro tied Rackley's feet, this Petitioner, Lonnie McLucas, ties his hands to the arm of a chair. (Tr.p.519).

George Sams then told the Petitioner to tell some girls upstairs to boil water and the Petitioner did this. Soon the Petitioner returned with the boiling water and placed it on the floor. Sams picked up the boiling water and started pouring it on Alex Rackley. Since Rackley was gagged, his efforts at screaming could not be heard and he just twisted in the chair, once overturning the chair. (Tr.p.520).

After some more hot water was poured on Rackley by Sams, he also poured some cold water on him. Sams took the gag off

of Rackley's mouth and Rackley indicated that he was ready to talk. Sams said "get the tape recorder." Kimbro then operated the tape recording equipment. (Tr.p.519).

After Rackley's gag was removed, he was asked questions about what he knew about informers in the New York chapter of the Black Panther Party (Tr.p.530) and it appeared to Warren Kimbro that Rackley answered by making up stories about members of the party in New York (Tr.p.530) in order to be talking and avoid further disciplining.

A tape recording was made of the interrogation of Alex Rackley. George Sams said that the tapes would be given to Landon Williams and sent to National. (Tr.p.532).

After the interrogation, Rackley was cut loose and told to go upstairs, take a shower, and get some first aid. (Tr.p.533).

Kimbro that night went to an Adam Clayton Powell rally in Hartford with George Sams and Ericka Huggins while the Petitioner, McLucas, and George Edwards stayed at 365 Orchard Street to watch Rackley. (Tr.pp.537,538). When they returned from Hartford, Sams saw that Rackley was being allowed to walk around the house so he told the Petitioner, who was in charge then, to "Tie him up" so Rackley was tied to a bed. The Petitioner, Kimbro and Sams helped each other to tie Rackley to a bed with ace bandages and rags. (Tr.p.539).

Shortly thereafter Landon Williams and Roy Hithe came in. Landon Williams asked Sams what was happening and Sams told Williams about the tapes that had been made and Williams looked at Rackley and said "He isn't tied secure enough, get some hanger wire" and Williams proceeded to tie Rackley with hanger wire. Williams told the Petitioner, McLucas, to put hanger wire around Rackley's wrist. (Tr.p.240).

Kimbro played the tapes of the interrogation to Landon Williams and Roy Hithe after which they looked at one another and they told Kimbro and Sams to hold Rackley there. (Tr.p.562). George Sams assigned a couple of girls to watch Alex in an upstairs room at 365 Orchard Street. (Tr.p.562).

On the following day, Monday, Chairman Bobby Seale of the National Black Panther Party was going to address a rally at Yale University, so preparations were made for that event by local chapter members. (Tr.p.563). Kimbro observed Rackley during Monday and he seemed like he had a fever. Because of what Landon Williams had said, Rackley was not fed at all on Monday. (Tr.p.563).

On Tuesday, May 20, 1969, Kimbro met at 365 Orchard Street, during the evening hours, with Landon Williams and Roy Hithe. They observed Alex Rackley, who was still tied to the bed in an upstairs bedroom. Hithe and Williams were upset with George Sams that preparations had not been made to have Rackley removed from there.

Hithe and Williams wanted to know why Sams hadn't made arrangements to have a car. While the Petitioner was present, Hithe said to get a car and a call was made to obtain one. (Tr.p.680).

Both the Petitioner and Kimbro made a call to people in Hartford in order to get these people involved and to bring another hand gun. (Tr.p.681)

Following a conversation between the Petitioner, Hithe and Williams, Kimbro got some dark clothes ready for McLucas. (Tr.p.684). Kimbro also got himself some dark clothes since he was told that he would be going also. (Tr.p.685).

McLucas, at the request of Landon Williams, made a phone call to Hartford on the house phone. Kimbro heard McLucas raise his voice at whomever was talking from Hartford and it seemed as though the person in Hartford was putting McLucas on. Kimbro, therefore, took over the phone call. (Tr.p.685).

Kimbro heard McLucas say over the telephone to bring "some political power," which meant guns, and Kimbro chastised McLucas for using that term over the telephone. (Tr.p.686).

Landon Williams then ordered that Alex Rackley be made ready. He told this to George Sams, who got a few girls to go upstairs with him and they started to get Alex dressed. Kimbro then went upstairs and cut Rackley loose from the bed. Landon Williams, who was present in the upstairs bedroom had a .45 (handgun) and he told Kimbro to go downstairs and get a

rifle. (Tr.p.687).

Kimbro had first seen the .45 handgun when Roy Hithe brought it from New York the previous Thursday and the gun was subsequently kept in a coffee table drawer at 365 Orchard Street. (Tr.p.688).

After Rackley was dressed he still had some bandages and tape on his wounds. He had rope around his wrists and a hanger wire around his neck. Kimbro and Williams were each holding one of Rackley's wrists. As he stood up he was a little shaky and wanted to sit down but Williams would not let him because he was going to be taken out. (Tr.p.692). Rackley was then taken downstairs, through the living room and the kitchen, and out the back door. (Tr.p.693).

As Rackley was being led out of 365 Orchard Street, Landon Williams noticed that the hanger wire around his neck was still sticking up, so he took a jacket and threw it over the hanger wire so it wouldn't be seen from the street and he put a black leather coat over the .45 gun and walked Rackley out to the waiting car. (Tr.p.695).

The jacket placed over the hanger wire was a green fatigue bush jacket which belonged to Lonnie McLucas. (Tr. p.696).

The car parked outside 365 Orchard Street was being driven by the Petitioner, McLucas. (Tr.p.697). Rackley got in the back seat of the car along with George Sams, while Kimbro got in the front seat with the defendant. (Tr.p.697).

Landon Williams gave the .45 gun to George Sams and said something like "right on" or "all power to the people". (Tr.p.698). The vehicle then left and George Sams asked Warren Kimbro to find a wooded area. (Tr.p.698).

McLucas drove the car through the streets of New Haven and eventually entered I-91. Sams told Rackley that there were orders to kill him but that they weren't going to do it, and he told Rackley that they were going to let him off in a swamp and he could then flee to anywhere, as long as he stayed away from the Black Panther party. (Tr.p.699).

In Middletown, McLucas drove off I-91 and eventually came to a dark wooded area on the road going off to Powder Hill. After stopping, the Petitioner lifted up the hood of the car and turned out the lights to make it appear as though something was wrong with the car. (Tr.p.701).

The group then proceeded to walk into the wooded area in the following order: first Alex, next Kimbro and McLucas, then Sams. McLucas carried a flashlight and Sams was carrying the .45 but handed it to Kimbro. (Tr.p.703). After they had gone a short distance in this swampy area, Sams gave Kimbro the .45 and told him "Ice him. This is from National," whereupon Kimbro fired a shot into the back of Alex Rackley's head. (Tr.p.703).

After Kimbro shot Rackley he placed the gun down and started to walk back to the car. McLucas had the flashlight and they all started to run. Sams then said

something like "See if he's dead." George Sams then gave the .45 to the Petitioner, who went back into the woods. Kimbro saw a flash and a noise. The Petitioner came running back to the car and told Sams that he had shot Alex, as he said, "Right in the chest." Sams then took back the .45 handgun from the Petitioner. (Tr.p.704). The Petitioner then drove the three - Sams, Kimbro and himself - back to New Haven to Black Panther Headquarters at 365 Orchard Street. (Tr.p.705).

On the basis of all of the preceding evidence, inter alia, the jury had more than sufficient evidence upon which to base its finding that Lonnie McLucas was guilty beyond a reasonable doubt of a conspiracy to murder Alex Rackley.

REASONS FOR DENYING THE WRIT

I

A. THE TRIAL COURT ACTED PROPERLY IN DENYING THE PETITIONER'S MOTION TO SUPPRESS THE STATEMENTS HE MADE TO NEW HAVEN POLICE ON JUNE 11, 1969.

Although the Petitioner claims before this Court that the trial court erred in quashing the subpoenas issued to F.B.I. officials during his state criminal trial on the question of electronic surveillance, the same argument was raised before the Supreme Court of the State of Connecticut on the greater, and more significant, issue of whether the trial court should have suppressed a statement made by the Petitioner to Sergeant Vincent DeRosa, of the New Haven Police Department, at the New Haven County Courthouse, on June 11, 1969. Whether the court should have quashed the subpoenas was merely a component of a decision on the propriety of the court's ruling that the Petitioner's statement was freely and voluntarily given, without actually having to rule on the legality of the Petitioner's arrest in Salt Lake City.

Petitioner claimed, at trial, that he had a "suspicion" that illegal wiretaps were involved in that Salt Lake City arrest and submits, now, that Congressional hearings have indicated that the Black Panther Party was in fact the object of

extensive and illegal technical surveillance at and about the time that Petitioner's arrest occurred in 1969.

None of this, of course, was made known to the trial court and Petitioner's claims (whether justified or not by subsequent disclosures - a point in no way conceded by the Respondent) were couched in terms of a "suspicion" that electronic surveillance was involved in the arrest. In short, at the time of trial, the request for an inquiry by the Petitioner into electronic surveillance reasonably appeared to be nothing more than a "fishing expedition" to divert the trial court's attention from the greater determination of whether the Petitioner's statement to the police was freely given. As to this question, the legality or illegality of that arrest was only a threshold concern. This provides a context for the question raised before this Court of whether the trial court erred in quashing the subpoenas to F.B.I. agents, pursuant to 5 U.S.C. § 552 (b)(7), the Freedom of Information Act.

During the trial, the United States, represented by Peter A. Clark, an Assistant United States Attorney, submitted the motions to quash the two subpoenas issued by the Petitioner's counsel (Mr. Koskoff) to the F.B.I. agents on July 16, and July 21, 1970.

In his oral argument, defense counsel admitted that he could not submit an affidavit because he had no way of knowing whether there had been any illegal wiretapping.

The constant attempt by the defendants in the Alex Rackley murder cases to portray the government's prosecutions of various members of the Black Panther Party for the murder of Rackley as "political prosecutions" cannot be forgotten. Hence, the seriousness of the defendants' claim that illegal wiretapping was "suspected," given the "political" nature of the defense and the larger audience which the defendants sought to influence, must surely have been a factor in the mind of the Court in determining whether to infringe upon the well-respected comity relationship existing between the State and Federal systems, by forcing federal agents to testify against the dictates of the federal statute.

The Court clearly did not err in quashing the subpoenas against the federal agents. Under the broad rules of pretrial discovery in the Federal Rules of Criminal Procedure, those materials are discoverable which may be helpful to a defendant in the presentation of his case but, as 5 U.S.C. Sec. 552 (b)(7) read at the time of this trial:

> "This section does not apply to matters that are...(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

The Petitioner argues tortuously that 18 U.S.C. Sec. 2518 (8)(d), which provides that notice must be given to "persons named in the wiretap order...and such other parties to intercepted communications as

the judge may determine..." means that one, such as Petitioner, even if it was not his telephone which was being tapped, or his own personal conversations being recorded, might still receive notice as an "intended" object of electronic surveillance, thereby making the wiretap information subpoenable by him pursuant to 5 U.S.C. Sec. 552 (b)(7). This argument is tenuous, at best. Similarly, the Petitioner's next argument, ie, that Washington v. Texas, 388 U.S. 14 (1967) and the Sixth Amendment right of all defendants in a criminal prosecution to compulsory process for obtaining witnesses, mandates that this Petitioner have access to the alleged wiretap information, clearly assumes too much.

One basic distinction is that the present action involved a preliminary question about the voluntariness and the admissibility of a single statement, it had nothing to do with the ability of the Petitioner to present his own version of the facts by the compulsory attendance of witnesses at trial.

The Petitioner's citation of the case of United States v. Nixon, 418 U.S. 683 (1974) provides a most interesting precedent but is one which, unfortunately, had very little to do with the issue before this court. The historic decision, which determined that the constitutional doctrine of Executive Privilege did not, in every case, outweigh the traditional rules of compelling (by subpoena) evidence in a criminal case, was obviously a unique situation. The broad language used by the Supreme Court describing the adversary

system used in the criminal courts of this country was obviously not designed as a specific precedent for a question as unique as the one presented to this Court now.

The subpoenas to the F.B.I. agents in this case were properly quashed by the trial court, and neither 5 U.S.C. Sec. 552 (the Freedom of Information Act) nor the 6th Amendment to the United States Constitution compel a contrary result.

B. THE TRIAL COURT'S DETERMINATION THAT THE PETITIONER'S STATEMENT WAS ADMISSIBLE WAS REACHED AFTER SUFFICIENT CONSIDERATION OF THE POSSIBILITY OF "OFFICIAL MISCONDUCT" LEADING TO THE PETITIONER'S ARREST IN SALT LAKE CITY.

The issue of whether the Court erred in quashing the subpoenas to F.B.I. agents, supra, would not be dispositive of whether the Petitioner's statement to Sergeant DeRosa was admissible. Even assuming, arguendo, the illegality of the Petitioner's arrest in Salt Lake City, this would not end the Court's inquiry under the "poisonous tree" doctrine of Wong Sun v. United States, 371 U.S. 471, 487-488, 83 S. Ct. 407, 9 L. Ed. 2d 411. Before the State Supreme Court the Petitioner relied heavily on the wiretap question and his inability to probe the legality of his original arrest. The trial court quite properly, however, placed a greater emphasis on determining the voluntariness of the Petitioner's statements.

As to this, there was more than ample evidence to indicate that the Petitioner had repeatedly been warned of his constitutional rights, had waived same intelligently and knowingly, and had voluntarily given his statement to police. This emphasis on the voluntariness of the statement rather than on the Petitioner's speculative assertions about official misconduct was justified under principles enunciated by this Court in Brown v. Illinois, 422 U.S. 590, 603, 604 (1975), as follows:

"...It is entirely possible... that persons arrested illegally frequently may decide to confess, as an act of free will unaffected, by the initial illegality. But the Miranda warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession...

While we therefore reject the per se rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative per se or 'but for' rule...The question whether a confession is a product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive...The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factors to be considered. The temporary proximity of the arrest and the confession, the presence of intervening circumstances...and particularly, the purpose and flagrancy of the official misconduct are all relevant... The voluntariness of the statement is a threshold requirement...and the burden of showing admissibility rests, of course, on the prosecution."

Before the trial court, the Petitioner was able only to make sweeping allegations about official misconduct and speculation about possible electronic surveillance leading to his arrest. Now, approximately eight years after his arrest in Salt Lake

City, the Petitioner is still unable to offer anything more than speculation (based on the Congressional hearings) that wiretapping might have played a role in his initial arrest. Were this Court to accept Petitioner's thesis, the trials of criminal cases in this country would become mini-legislative hearings into law enforcement investigative procedures whenever a defendant can assert a "suspicion" that "official misconduct" has led to his arrest. To avoid this, even under Brown v. Illinois, supra, the Petitioner (or any defendant) must surely raise the level of his allegations of official misconduct beyond that of the speculative and make some prima facie showing that the allegations have substance. In the absence of this (as here) the trial court did not err in placing an emphasis, in its inquiry, on the voluntariness of Petitioner's statements, rather than the difficult to ascertain "official misconduct."

II

THERE IS NO AUTHORITY IN THE COURTS OF THE STATE OF CONNECTICUT FOR AUTHORIZING IMMUNITY TO DEFENSE WITNESSES AND THE ABSENCE OF SUCH AUTHORITY DOES NOT DEPRIVE A DEFENDANT OF DUE PROCESS OF LAW.

In this portion of his argument, the Petitioner suggests that there is a conflict of authority among the various Courts of Appeal concerning whether denial of immunity to defense witnesses who invoke the Fifth Amendment constitutes a denial of due process.

In support of this contention, he cites the case of United States v. Morrison, 535 F. 2d 223, 229 (3rd Cir. 1976), which stands for the principle that:

> "There are circumstances under which it appears due process may demand that the government request use immunity for a defendant's witness..." (emphasis added)

Both the courts in Morrison, supra, and the Petitioner in his brief make reference to the dicta found in United States v. Leonard, 161 U.S. App. D.C. 36, 494 F. 2d 955, 985 n. 79 (1974) (concurring and dissenting opinion of Bazelon, C.J.); and Earl v. United States, 124 U.S. App. D.C. 77, 361 F. 2d 531, 534 n. 1 (1966) (Burger, J.)

These cases, however, can hardly be said to create a real conflict vis-a-vis all of the other Circuit Courts of Appeal

which adhere to the principle that it is peculiarly within the authority of the government, not the court, to confer any immunity upon a witness, pursuant to 18 U.S.C. § 6003 in the Federal system and Section 54-47a of the General Statutes, in the Connecticut state system, and that, barring unusual circumstances which have nowhere heretofore arisen, the denial of a request by a defendant for immunity for one of his witnesses does not rise to the level of a constitutional denial of due process. United States v. Smith, 542 F. 2d 711,715 (7th Cir. 1976); United States v. Allstate Mortgage Corp., 507 F. 2d 492 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); Cerda v. United States, 488 F. 2d 720, 723 (9th Cir. 1973); United States v. Berrigan, 482 F. 2d 171, 190 (3rd Cir. 1973); United States v. Jenkins, 470 F. 2d 1061, 1063-64 (9th Cir. 1972), cert. denied 411 U.S. 920 (1973); In re Kligo, 484 F. 2d 1215, 1222 (4th Cir. 1973); Earl v. United States, 361 F. 2d 531 (D.C. Cir. 1966).

As there are no "unusual circumstances" in the present case, as there were in United States v. Morrison, supra, there is no reason to believe that this Court would use this case as a vehicle to determine what is not, in actuality, a split of authority among the various Circuits.

III

THE TRIAL COURT DID NOT ERR IN HOLDING THAT PETITIONER LACKED STANDING TO CHALLENGE THE USE OF EVIDENCE SEIZED AT WARREN KIMBRO'S APARTMENT.

The Petitioner alleges that he had such a possessory interest in the premises at 365 Orchard Street, and such a reasonable right to expect freedom from governmental intrusion in those premises, that the trial court erred when it concluded that the Petitioner had no standing to challenge the introduction as evidence of a tape recorder, a tape recording and a weapon seized at 365 Orchard Street on the day after the Rackley murder was discovered.

The Petitioner claimed that he had standing to challenge the search on the basis of his membership on the central staff of the Black Panther Party. The trial court concluded that the Petitioner did not have standing to challenge the search and seizure in that he was not on the premises at the time of the seizure and had no possessory interest in either the premises or the articles seized. "There is no standing to contest a search and seizure where...the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search

and seizure," Brown v. United States, 411 U.S. 223, 229, 93 S.Ct. 1565, 36 L. Ed. 2d 208. A person may have a possessory interest in the premises searched even though he has no title to the premises. Mancusi v. DeForte, 392 U.S. 364, 467-68, 88 S. Ct. 2120, 20 L. Ed. 1154; Jones v. United States, 363 U.S. 257, 265, 80 S. Ct. 725, 4 L. ed. 2d 697. The Petitioner has the burden of establishing the facts necessary to demonstrate a basis for standing to attack the search and seizure. It has been made clear that capacity to claim the protection of the fourth amendment depends not upon a property right in the premises searched but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. Mancusi v. DeForte, supra, 368; Katz v. United States, 389 U.S. 347, 352, 88 S. Ct. 507, 19 L. Ed. 2d 576. It is evident that the Petitioner was not charged with an offense that had as an essential element the possession of the seized evidence at the time of the search and seizure. See Brown v. United States, supra. In addition, there is no claim that the Petitioner was at the apartment when the police entered and the seizure occurred, or that the articles either belonged to the Petitioner or were in his custody at the time they were seized.

In this case, then, the critical issue on the Petitioner's motion to suppress was whether, in light of all the circumstances, the Petitioner had a possessory interest in the searched premises at 365 Orchard Street such that those premises constituted an area in which the Petitioner had a "reasonable expectation of freedom

from governmental intrusion." Mancusi v. DeForte, supra. In Mancusi, the defendant union official was found to have standing to object to the seizure of certain union records. The papers were taken from an office which was used for union purposes and which the defendant shared with several other union officials. It was stipulated that he spent a considerable amount of time in that office, and that he had custody of the papers at the moment of their seizure. He was present in the office during the seizure, and protested the taking of the papers. In marked contrast, in the present case, Warren Kimbro was the person who resided in, and paid the rent for, the apartment at 365 Orchard Street; the Petitioner did not live in this apartment, had no propriety interest in it, and had only stayed overnight there once; the Petitioner had no possessory interest in the articles seized; the Black Panther group in New Haven held meetings at Warren Kimbro's apartment; and the apartment was mainly a residence and only sometimes used for office purposes by the Black Panther group. In further contrast to the situation in Mancusi, in the present case the Petitioner did not have custody of the items at the moment of seizure.

The Petitioner would have this Court probe beyond these obvious factors in determining the precise political nature of the Black Panther Party and the extent of Petitioner's involvement with that allegedly political organization. This Court clearly is not the best forum for making such an inquiry. There is no reason to believe that this issue is a proper one for hearing on a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petitioner for a Writ of Certiorari to the Supreme Court of the State of Connecticut should be denied.

Respectfully submitted,

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